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NO. 83-1515

In the

Supreme Court of the United States

October Term, 1983

MOBIL OIL CORPORATION, EXXON CORPORATION, GULF OIL CORPORATION and MARATHON PETROLEUM COMPANY,

Petitioners,

v.

UNITED STATES DEPARTMENT OF ENERGY and DONALD P. HODEL, SECRETARY OF ENERGY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

PETITIONERS' JOINT REPLY BRIEF

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Respondents.

Petitioners[1] submit this joint brief in reply to the Brief for the Respondents in Opposition ("DOE Br."). Contrary to the impression respondents seek to create, the issues presented are hardly matters of passing academic interest. Rather, the decision below announced broad and novel interpretations of the Administrative Procedure Act ("APA") which the Temporary Emergency Court of Appeals ("TECA") itself recognized threatened to create an "all purpose escape-clause" from APA rulemaking. Pet. App. A-29. Those issues merit this Court's review, especially since billions of dollars may hang in the balance.

1. Pursuant to Rule 28.1, a listing of each petitioner's non- wholly-owned subsidiaries or affiliates is set forth in the Petition Appendix ("Pet. App.") at 119-140.

ARGUMENT

I. The Rule At Issue Was Not Mandated by Congress

DOE asserts that TECA's interpretation of the APA in this case was justifiable because the rule at issue was responsive to the agency's Congressional mandate.[2] It relies upon the views of eight members of the Senate Committee on Interior and Insular Affairs, DOE Br. 6-7, as support for its position that the deemed recovery rule was "required by the 'purpose and intent' of the EPAA." DOE Br. 7. *See* S. Rep. No. 26, 94th Cong., lst Sess. (1975). The Interior Committee's bill, however, was stricken entirely by the House of Representatives. Thus, the views of those Senators did not prevail in the Congress as a whole. *See* S. Conf. Rep. No. 516, 94th Cong., lst Sess. 116 *reprinted in* 1975 U.S. Code Cong. & Ad. News 1956, 1957. Majorities of the full House and Senate concluded that the market had largely returned to normal and that "a comprehensive regulatory structure. . . may no longer be necessary." *Id.* at 203, 1975 U.S. Code Cong. & Ad. News at 2045. Accordingly, Congress enacted the Energy Policy and Conservation Act ("EPCA") giving the President authority to propose the decontrol of petroleum product prices. *Id.* at 204, 1975 U.S. Code Cong. & Ad. News at 2045-46; Pub. L. No. 94-163, § 455, 89 Stat. 871, 950-952. Thus, the EPCA certainly cannot be described as a Congressional directive to continue any price control regulation.

Notwithstanding the assertions in its brief, the agency is well aware that the deemed recovery rule was not mandated by Congress in either the EPAA or the EPCA. Acting under authority granted by both of those Acts, DOE eventually revoked the rule, concluding that it ran counter to the statutory goals of the EPAA. *See* 45 Fed. Reg. 72626, 72628 (Nov. 3, 1980). Earlier, in the September 10, 1974 notice proposing to modify the rule, the

2. For example, the agency states that "Congress directed the agency to foreclose [discriminatory pricing] by appropriate regulations," DOE Br. 13, and that the purpose of the rule was "Congress's mandate that there be no price discrimination," *id.* at 19. *See also id.* at 16 n.13.

agency had noted that the rule "can have results that appear to be at odds with the objectives of the EPAA."39 Fed. Reg. 32717 (Sept. 10, 1974). Given these prior determinations, the suggestion that the rule did no more than follow a Congressional "mandate" is wholly inaccurate.

II. TECA's Novel Interpretation of the APA Good Cause Exception Merits Review

Petitioners have shown that by according "special deference" to the agency's assertion that public participation in a rulemaking would be contrary to the public interest, TECA effectively created the "all purpose escape-clause" which it feared. *See* Petition ("Pet.") 9-14. Respondents do not address this serious implication of the decision below and simply defend that ruling as following this Court's teachings regarding judicial deference to agency judgments. DOE Br. 14. This Court, however, has never held that an agency's decision to avoid public rulemaking is entitled to deference, much less the special deference which TECA accorded the agency here. The APA reflects Congress's judgment that the benefits of public rulemaking outweigh its costs. The contrary judgment of administrators should be subjected to strict judicial scrutiny, not accorded special deference.

Significantly, the agency has no response to petitioners' showing that, under TECA's decision, agencies can dispense with rulemaking simply by asserting that regulated parties will seek to avoid a proposed rule during a comment period. *See* Pet. 12. DOE's alleged fear of grandfathering — to which TECA deferred — was specious, since any rule promulgated after notice could easily have prevented such grandfathering. Pet. 14. Respondents do not discuss, much less dispute, that fact. Nonetheless, that unsupported speculation was afforded total deference by TECA. Similarly, respondents do not deny that there was a regulatory prohibition against the price discrimination which the agency feared would take place during a short notice period. *See* DOE Br. 16 n.13; *cf.* Pet. 13-14. Instead, DOE asserts that Congress directed the agency to guard against discriminatory pricing

"notwithstanding the existence of such general prohibitions."[3] As shown above, no such legislative directive existed, and TECA certainly never relied upon such a supposed mandate. Rather, TECA simply deferred to an agency conclusion for which there is no support.

Petitioners do not suggest, as respondents assert, that their "disagreement with TECA's assessment of the facts" warrants this Court's review. DOE Br. 16. Rather, petitioners have shown that TECA's holding that an agency decision to bypass rulemaking is entitled to special deference presents important questions which have not been decided by this Court. That the deference here was to the agency's unsupportable speculation merely highlights the danger inherent in TECA's approach.

III. TECA's Open Departure From the APA Warrants Review

Respondents do not deny that the APA requires an agency to incorporate a statement of good cause for dispensing with rulemaking in the rules issued. DOE Br. 12. Nor do they deny that TECA looked to the September 10 notice of proposed rulemaking to support the adequacy of the agency's September 5 good cause statement. DOE Br. 16 n.13. The agency claims that this search was justified since, as TECA concluded, the September 10 statement was not "made for litigation." *Id.* Whether an agency may rely upon statements manufactured for litigation is not at issue. The issue is whether the judiciary may engage in a roving quest

3. As support for this assertion, respondents cite to "page 4 note 5" of their brief. *See* DOE Br. 16 n.13. In the referenced note, however, the agency merely refers to several of the general objectives of the EPAA. DOE Br. 4 n.5. The DOE's general anti-discrimination regulation, however, was promulgated *after* passage of the EPAA. *See* 39 Fed. Reg. 5311 (Feb. 12, 1974). Thus, the EPAA was certainly not a direction to guard against discriminatory pricing "notwithstanding the existence" of a general prohibition promulgated after its passage. Moreover, as shown *supra*, neither the EPAA nor the EPCA directed the adoption or maintenance of the deemed recovery rule.

for any agency pronouncement which might qualify as a statement of good cause for dispensing with rulemaking notwithstanding the APA's explicit requirement to the contrary. DOE's Brief demonstrates the error of TECA's approach.

As DOE summarizes, "the September 10 notice merely discussed the pros and cons of the rule," DOE Br. 16 n.13, in the context of a proposed amendment to the rule. It did not purport to set forth any reasons for dispensing with public rulemaking when the rule was originally issued. Indeed, by cataloging the deleterious effects of the rule, the September 10 notice confirms that there was no good cause for the rule itself, much less good cause for denying the public its right to participate in the rule's adoption. Nevertheless, TECA selected certain agency pronouncements and declared that they constituted a good cause statement even though they did not even purport to be one. If TECA's decision is allowed to stand, agencies will have no incentive to set forth adequate good cause statements and other courts will be encouraged to search, after the fact, for some justification for agency action. That decision merits review by this Court.

IV. TECA's Elimination of the APA's Basis and Purpose Statement Warrants Review

As shown in the Petition, TECA's holding that the agency "repromulgated" the deemed recovery rule on December 5, 1974 was plain and inexplicable error. Pet. 17-21. On December 24, 1974, the agency stated that it had "not yet completed its analysis" of its September 10 proposal to modify the deemed recovery rule. 39 Fed. Reg. 44407 (Dec. 24, 1974). *See* Pet. 5, 21. Thus, the agency could hardly have intended to repromulgate the rule on December 5, 1974.

Respondents offer no alternative explanation of the DOE's December 24, 1974 statement. Instead, the agency, like TECA, simply ignores this recognition — this proof — that no repromulgation took place on December 5. DOE then persists in defending TECA's holding that the statement of basis and purpose required

by the APA may be non-existent where the agency's purpose is "evident."[4] DOE Br. 19.

The decision below adopts an interpretation of the APA which permits an agency to dispense with a statement of basis and purpose for its actions and subsequently argue that its aims were "evident."That decision erodes one of the specific APA requirements through which Congress sought to ensure reasoned agency decisionmaking.

V. The Substantial Consequences of the Decision Below Underscore the Need For Review by This Court

Respondents do not dispute petitioners' statement that DOE's ongoing enforcement proceedings allege in excess of one billion dollars in overcharges based on fictitious cost recoveries under the deemed recovery rule. Pet. 4. As respondents point out, two district courts have already relied upon TECA's decision in private overcharge suits. DOE Br. 11 n.10. Although the price control program terminated more than three years ago,[5] the agency can be expected to rely upon the decision below in all its rulemaking litigation and enforcement proceedings and private parties will undoubtedly do the same in their overcharge suits. Moreover,

4. As set forth in the Petition, TECA merely guessed, and guessed incorrectly, that the agency thought the rule was in the public interest. Pet. 19-21. Thus, while the September 10 notice "discussed the pros and cons of the rule," DOE Br. 16 n.13, the December 5 statement does not explain why the agency would have concluded that the adverse impact of the rule should be continued. Nor is there any indication that the agency had considered issues raised in the comments and still decided to repromulgate the rule. Indeed, there is no explanation why the agency did not conclude that the rule was contrary to the public interest, as it subsequently concluded when revoking the rule in 1980. 45 Fed. Reg. 72626, 72628 (Nov. 3, 1980). In short, the agency never explained the basis and purpose for its alleged December 5 promulgation; TECA merely incorrectly speculated as to DOE's rationale.

5. Respondents suggest that petitioners' challenge to the deemed recovery rule was "belated" since it was brought in January 1979, slightly more than four years after the rule was promulgated. DOE Br. 2, 7, 21. As the district court recognized, however, petitioner Mobil brought this action promptly after it had reason to believe that it was potentially adversely affected by the rule in light of the agency's interpretation of another rule. Pet. App. A-82. *See id.* at A-74-A-82. Indeed, DOE itself did not formally allege that petitioner Mobil had probably violated the rule until almost one year after Mobil brought this action. Office of Special Counsel, Department of Energy, Case No. RMOB00001 (Notice of Probable Violation issued December 12, 1979).

TECA's decision announces broad principles which apply in any APA context. Thus, those issues and the decision below are not of "purely academic interest." DOE Br. 12.

Congress subjected the DOE to the same APA requirements as other administrative agencies and permitted regulated parties in the energy industry to enforce those procedural safeguards. Similarly, although TECA is a specialized court, Congress provided that TECA's decisions were reviewable by this Court in appropriate cases. This is just such a case, since TECA's novel application of the APA threatens to create an "all purpose escape-clause" which may be relied upon by DOE or any other agency.

CONCLUSION

For the reasons set forth above and the additional reasons stated in the Petition, petitioners urge that a writ of certiorari issue to review the decision of the Temporary Emergency Court of Appeals.

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